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DISCUSSION AFTER THE SPEECHES OF CHARLES CACCIA AND MATTHEW SCHAEFER

QUESTION, PROFESSOR CHODOSH: What can we do to ensure better accountability as we move toward various forms of supranational organizations and institutions? Are there any strategies that you would offer for achieving greater accountability within international systems?

ANSWER, MR. CACCIA: If I had the answers, I would not be here. Obviously, there is no answer that one can invoke quickly. This is why we need conferences of this kind to raise this question and stretch our thinking. Evidently, we all want the transfer of sovereignty because there are some very good reasons for it. The ironic part of this is that environmental movements, for instance, are very much in favor of international agreements like the Kyoto Protocol.¹ When it comes to environmental matters, that is fine. But when it comes to international trade, the very same groups become very nervous, and sometimes are very much opposed to a similar trend.

It is the country that makes them go one way or the other. I suppose this happens to all of us individually, depending on the content of the proposal. But if, intellectually, we are committed to sovereignty, to the transfer of sovereignty, and to moving to a regime whereby we have a form of government that takes into account the necessities imposed by global issues like climate change, then we have to improve our capacity to maintain accountability in the new laws that we create. Evidently for some, it indicated the transparency which Mr. Rosenthal mentioned earlier this morning, and that will help. But there must be ways for these newly created bodies, like the ones in charge, for instance, of the Kyoto Agreement and the WTO, to provide the public with a sense that, if their action and their decisions are not acceptable, their respective governments will still have a say in the implementation of their decision. In the end, it is the state that has to ensure that the social cohesion of the country is not affected by international decision, and that can be done. But the public has lost confidence in these distant policies, particularly in Europe, because their elected representatives do not seem to be able to control and to enforce, and have a say in the commission's decision.

In the case of Ethyl Corporation, we are looking at ourselves and feeling like a bunch of idiots because we passed this legislation two years ago. Now, we are beginning to wonder if the whole agreement is worth having if our

¹ United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998).

own Parliament's legislation can be contested and taken to a panel of three very distinguished Canadian citizens (one of whom is a former senator, Gaston Gay, another one is a former premier of Ontario, Bob Rae, and the third one I do not remember). They are to listen, examine, and then make recommendations about whether Ethyl has a case or not. In the meantime, the Parliament of Canada can just sit and wait for another couple of years.

ANSWER, PROFESSOR SCHAEFER: Let me just say a word quickly on legitimacy and sub-federal governments. Sub-federal government compliance is very important. States and provinces are huge economic actors in the world. My research assistant put together a list of hypothetical economic jurisdictions. If you treated states and provinces as separate nations, Ohio was the twenty-fourth largest economic jurisdiction in the world. California was seventh, and New York was tenth. You find twenty to twenty-five states in the top fifty jurisdictions. You also find a couple of provinces, Ontario and Quebec. Their compliance with these rules is as important to world welfare as compliance by some nations.

Just to tie in with what the previous panel mentioned, what is the difference between late international law and national law? Does international law enter the domestic legal system in terms of enforcement mechanisms here in the United States? Only the federal government can sue the states for non-compliance with WTO obligations. Private parties cannot sue. The federal government is very reluctant to do so. They are not anxious to do so at all. Therefore, we really need states to voluntarily comply. This raises the importance of the WTO system being seen as "the given" in the eyes of some sub-federal governments. How do we raise that legitimacy?

I think we have already taken several steps. Both the NAFTA implementing bill and the WTO implementing bill require state involvement in dispute settlement cases. One reason maybe why *Beer II* has not been implemented as well as it should have been by the states is because they were not involved. They were upset about their lack of involvement in that case. With future disputes, the federal government is required to involve states. So, that is just one way by which we can enhance the legitimacy of the WTO in the eyes of state governments. We are going to need to do so because the federal government does not seem to be too anxious to confront the states on some of their violations.

COMMENT, MR. CACCIA: In Canada's case, the problem is the reverse. We have three provinces who are joining Ethyl Corporation in this action: Alberta, Quebec, and Saskatchewan. They are taking issue with the decision on the involvement of Canada.

COMMENT, PROFESSOR SCHAEFER: I actually had a conversation last night over dinner with someone from the finance ministry on the issue of

investment attraction subsidies by states and localities. Currently, there are not many constraints to that activity. Look at the whole range of constraints within the U.S. system, especially state constitutional constraints. There are provisions, such as prohibitions on special legislation, that would arguably prohibit this. But state courts see themselves in a prisoner's dilemma. They do not want to injure their states economically. So those provisions do not constrain them. The dormant Commerce Clause similarly has this market participant exception. It does not constrain it sufficiently.

We talked last night at dinner about the WTO constraints. There are certain constraints that may apply. But again who can complain? Private parties cannot complain; only governments can complain. Ultimately, we are left in a system where there are no such constraints on these wasteful and distorted investment contraction subsidies by state governments. I think the same is probably true for the provinces as well.

QUESTION, MR. WOODS: This may be outside the jurisdiction of the panel, and it may pre-empt later conversations, but I am curious, given the panel's obvious concern with provincialism or more power by sub-nationals, and given their comments about the central government's reluctance to go too far in addressing those issues, and looking at what is happening in Europe with the European Union, I wonder if the panelists could comment on looking at sovereignty in the other direction. Perhaps because of our very different constitutional setups, it is possible to envision the possibilities and the problems involved in looking at some kind of North American Union based on the European model, which I think would be looking into the 21st century and beyond.

ANSWER, MR. CACCIA: I think it would be a serious mistake to think that the European model could be transplanted to North America, if I understand the question. The European model has a completely different economic history and cultural and linguistic makeup.

There is a coming together of very clearly defined separate entities that are working together and have no fear whatsoever of losing identity in terms of the cultures and languages. But, in the case of North America, the conditions are very different in an historical perspective and very far apart. The principal motive for Europe is to prevent another war and to bring to an end the conflict started in France and Germany. So there are completely different forces and pressures at play that are driving this phenomenon. In North America, for example, the free movement of labor is something to think about right now, particularly in the U.S./Mexico relationship. I do not know whether that would ever happen.

For instance, we in North America have something that the Europeans do not fear at all, but we fear it in Canada. That is the issue of the distribution of

Time, Life, and Sports Illustrated. This is something that has troubled us, and it has been a matter of front-page headlines in Canada. But we feel very strongly about it due to cultural and linguistic reasons and we believe that is a decision which is hurting us considerably.

COMMENT, MR. DUDLEY: This is more in the nature of a comment than a question. I think it might tie together the issue of provincial and state subsidies with that Ethyl Corporation case against Canada that has you and others in Canada so excited.

I think it is important that we Canadians focus more on how important the need is for investment protection in other countries because our GEP is about triple that of U.S. exports. We are an exporting country. We live and die by investments and exports abroad and as more private partnerships become the norm rather than traditional investments, particularly with the infrastructure problem, we Canadians are going to benefit and are going to be very significantly exposed.

If we do not grant investment protections ourselves, or if we object to the defense or to the exercise of investment protections when it is convenient to us, or if we act angry about it, then we are not going to get those investment protections from Mexico. We are not going to get them from other countries, if that is in line with GATT's MAI and/or the investment protection agreement under the WTO. It is just too easy for Canada to shoot itself in the foot by saying that the Ethyl Corporation is holding up our laws by objecting to the fact that its investments have been, as it puts it quite properly, expropriated.

Frankly, I think Canada is going to win this one in a walk on the health exemption, but we just cannot suck and whistle any more like that, particularly when we need investment protection. I am a private lawyer, and I do a lot of international development work. I cannot even protect my clients because Canada has not signed the ICSID. So, we are going to lose unless we Canadians accept the fact that it is a two-way street; if you want investment protection, you have to grant it. And Mr. Caccia, if you wanted an easy case, all Canada would have had to do is put through the Terminal Three expropriation bill and you would have one. We would have lost that one hands down, because that was clearly expropriation.

The link to state subsidies, I think, comes up because the provinces have a legitimate interest in getting involved so that they can protect their right to bring in investments. But also, and this is a final comment, I certainly agree that the level of abuse in the case of subsidization by states and provinces is appalling. It is infinitely greater in the United States, partly because the U.S. government does nothing to control it. I have clients in Canada thinking of making investments in the United States who go around from state to state

and ask, boys, what is your offer? And then, what I have to do is review these offers to see if they qualify as subsidies under NAFTA, so that my Canadian clients, when they re-import the U.S.-made products into Canada, do not get sued by their Canadian competitors. Usually they are okay because these states have incredibly sophisticated staffs of subsidy-avoidance lawyers, economists, accountants, and everything else dreaming up ways to suck in investment without it constituting accountable subsidies. Well, our provinces in Canada cannot afford that kind of stuff. I know there are a lot of Washington lawyers who probably advise those state governments. In fact, I know a couple of them who do and they give damn good advice.

QUESTION, PROFESSOR KING: I had a question on accountability. I wanted to ask Mr. Caccia if we could have indirect accountabilities. You mentioned the IMF, which is not accountable to anybody. The problem is the structure of accountability. Can it be done indirectly through countries? You said the important thing is that it has to appreciate its constituency. Is the press a vehicle through which accountability can be established? You raise the problem. Now I will have you solve the problem.

ANSWER, MR. CACCIA: That is why there is a Canada-United States Law Institute, sir.

QUESTION, PROFESSOR KING: I think these dialogues are very important. But the problem is that the IMF sometimes acts in emergency situations, and the problem I am raising is how much checking back do you have to do to respond to your question, which I think is appropriate?

ANSWER, MR. CACCIA: Sir, let me only say that like many other things in life, it is not going to be an easy answer, and that we need our collective brains to explore and investigate and come up with the solution. It is not an easy fix.

It is, however, a trend of our times. It is a very strong trend. We are aware of it, and we are moving with it. We have to be aware that it is causing certain damages to the confidence of the public in the existing institutions and their respective governments, if they are not strong enough to do what people expect their governments to do, namely to come to their aid in times of need.

If certain measures related to trade, but including other human endeavors, do cause damage to society, people in turn look at their government and expect something. And if the government says, sorry, but it was the IMF, or it was the Geneva government, people are going to ask for a way to rectify the situation and provide some evidence to show them that the government is still in control. If the agreement is not good, you can change it. Surely certain regional agreements would have to be changed eventually. The answer is not going to be decided this morning. We will have to put our heads together. This is not the place to raise the question, but why is it that the participation

rate at election time is becoming lower and lower? Why is it declining, and why is that not a concern to us? If it is related to the question of declining accountability because of certain trends in the United Nations, then we have an agenda.

QUESTION, MR. WENDLANDT: My name is Chris Wendlandt. Let me ask this question. In the European experience, it was perceived, I think, that the European common market, being initially a trade arrangement, would fail unless it was given a political dimension, out of which came the economic union. And hence the question is whether or not trade arrangements, if they are only trade arrangements, failed because the interest of the participants changed over time, and, therefore, legitimacy could only be accomplished if it was given a political dimension. Having said that, is there a need for a political dimension for NAFTA to succeed over time?

ANSWER, MR. CACCIA: It is a good question, but I do not know the answer. We should discuss it, perhaps as a theme for the next conference.

QUESTION, MR. TUTTLE: My question is directed to Mr. Schaefer. You seem to imply that the idea of governments being able to bring cases before the WTO in some situations was not ideal. Do you think that Kodak, in the Fuji matter, would have fared better if they had gone before the WTO with an army of attorneys and made their case?

ANSWER, PROFESSOR SCHAEFER: Probably not. I do not think the results in the Kodak case would have changed. But I think what happens is, when you only have government-to-government dispute settlement, a lot of political considerations obviously enter into play in terms of which cases are brought and how they are approached. If you had economic interests that did not take into account those political considerations, probably the enforcement of trade agreement obligations would be greater.

There is a lot of talk about whether we ought to make international trade agreement obligations directly applicable, self-executing in U.S. terminology, in domestic courts; namely, whether we should allow private parties to bring claims in domestic courts for violations of international trade agreements. Most governments are not prepared for that. Some legal systems do not allow for it. In other legal systems, there would be complications because of a later-in-time federal enactment or an earlier-in-time treaty or earlier-in-time implementing legislation for an international trade agreement.

I do not think it is a boiler plate solution to the problem. But we are moving toward private parties bringing claims either before arbitration panels or before domestic courts. I think NAFTA Chapter 11 is one example of how the move is slowly occurring to allow private players more of a role in dispute settlement.

COMMENT, MR. TUTTLE: If you do allow the private players to eventually appear before the WTO, I imagine that would tie it up in an incredible knot.

COMMENT, PROFESSOR SCHAEFER: I think, if it ever happens, there will probably have to be some filtering mechanism developed. It is going to have to be a gradual evolution. The other problem is allowing private parties to sue in national courts without divergent interpretation of trade terminologies by different national courts. So there is a whole host of complexities that need to be addressed and solved. There is a good article by Thomas Cottier that appears in the new *Journal of International Economic Law* that talks about some of the problems with directive affect of trade agreements.²

ANSWER, MR. CACCIA: I go back for a moment to your very interesting question by only adding this. If you ask the man on the street in Europe today to name his representative in the European Parliament in Brussels, nine times out of ten, he will be unable to do so. When you ask the member of the European Parliament why people do not know him, he is likely to say it is because members of the Parliament have so little say. In the European Parliament, we have only an opportunity to execute parliamentary power when it comes to the appointment of commissioners and commission members. Beyond that, our legislative power is very weak, very minimal. This is why the Europeans talk about the famous democratic deficit. If we are to engage and explore the possibility for North America, we will be advised to do that fully aware and knowledgeable about the European experience so far, because it does not seem to produce adequate results.

There are very deeply felt resentments in certain regions, particularly in southern Europe, about the agricultural policies in Brussels, which were made again by distant technocrats. Some countries have done extremely well, but some have just been wiped out and their communities have, too. And the result is, the system is not able to be effective. But your question nevertheless is extremely valuable.

² Thomas Cottier, *The Relationship Between World Trade Organization Law, National, and Regional Law*, 1 J. INT'L. ECON. L. 83 (1998).

